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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 20
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Premdor, Inc.

v.

Safe & Sound, The Child Safety Specialists, Inc.

Opposition No. 111,846 to application Serial No. 75/264,029
filed on March 26, 1997

William O. Ferron, Jr. and David H. Deits of SEED INTELLECTUAL
PROPERTY GROUP PLLC for Premdor, Inc.

Timothy F. Demers of Stevens & Lee for Safe & Sound, The Child
Safety Specialists, Inc.

Before Hohein, Holtzman and Rogers, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Safe & Sound, The Child Safety Specialists, Inc., has
filed an application to register the mark "SAFE & SOUND" for
"anti-scald devices for showers" in International Class 11 and
"non-metallic devices and apparatus designed to prevent injury to
children and mentally or physically impaired persons, namely,
cabinet and drawer restraints, interior gates and indoor door
restraints" in International Class 20.¹

¹ Ser. No. 75/264,029, filed on March 26, 1997, which alleges dates of
first use of March 20, 1994 for the goods in both classes.

Premdor, Inc. has opposed registration on the ground that applicant's mark, when used in connection with applicant's goods, so resembles the mark "SAFE'N SOUND," which opposer has previously used and registered for "non-metal solid doors,"² as to be likely to cause confusion, mistake or deception.

Applicant, in its answer, has denied the salient allegations of the notice of opposition.

The record includes the pleadings; the file of the opposed application; and, as part of opposer's case-in-chief, the declaration, with exhibits, of its director of marketing, David Murray, which was submitted pursuant to a stipulation by the parties. Opposer, as the rest of its case-in-chief, has submitted a notice of reliance upon (i) a certified copy of its pleaded registration showing that the registration is subsisting and owned by opposer; (ii) excerpts from its deposition of applicant's president, Richard Shandelman;³ (iii) applicant's answer to opposer's Interrogatory No. 1; and (iv) certain

² Reg. No. 1,879,770, issued on February 21, 1995, which sets forth dates of first use of November 1992; combined affidavit §§8 and 15.

³ Although such excerpts fail to set forth clearly by whom the witness is employed and what his occupation is, it appears from other evidence in the record that the deponent is applicant's president. Moreover, while the deposition, which was conducted on October 6, 1999, was plainly taken outside of the discovery period, which by stipulation closed on July 25, 1999, opposer has treated the deposition as if it were a discovery deposition and no objection thereto has been raised by applicant. Applicant's brief, in fact, confirms that it regards only the excerpts therefrom as forming part of the record. The excerpts, therefore, have been considered as part of the record.

documents produced by applicant in response to opposer's first set of requests for production of documents.⁴

Applicant, as its case-in-chief, has filed the declaration, with an exhibit, of its president, Richard Shandelman, which was submitted pursuant to a stipulation by the parties. In rebuttal, opposer has submitted, in accordance with a stipulation by the parties, the declaration, with exhibits, of a litigation assistant/paralegal with its counsel's law firm, Ross Merritt, and the declaration, with exhibits, of a junior law clerk at a Canadian firm, Jennifer Nahorniak. Briefs have been filed,⁵ but an oral hearing was not requested.

Opposer's priority of its "SAFE'N SOUND" mark is not in issue inasmuch as the certified copy of its registration therefor

⁴ As a general proposition, documents produced in response to a request for production thereof are not proper subject matter for a notice of reliance unless they otherwise meet the requirements of Trademark Rule 2.122(e). See Trademark Rule 2.120(j)(3)(ii) and TBMP §711. However, since applicant in its brief has treated such evidence as forming part of the record, it has been so considered.

⁵ Opposer, with its main brief, has objected to the statements in ¶17 of Mr. Shandelman's declaration which discuss the parties' settlement negotiations in this matter. Specifically, opposer maintains that "information concerning settlement negotiations is not admissible as evidence under ... Fed. Evid. R. 408" and that, "[a]ccordingly, the statements made ... concerning settlement should not be considered by the Board in determining the merits of any claim in this proceeding." While applicant, in its brief, correctly notes that, under Fed. R. Evid. 408, "such evidence is inadmissible when offered 'to prove liability for or invalidity of the claim,'" applicant asserts that the statements concerning the parties' settlement negotiations were instead "offered in response to the testimony ... (Murray Decl. at ¶9) ... which discussed prior opposition proceedings brought by Opposer against others." We agree with opposer, however, that as set forth in its reply brief, "[t]he evidence [of settlement discussions] does not fit within the exceptions to Rule 408, which involve evidence directed to bias, prejudice, undue delay, and the like," and that such evidence is "inadmissible, as it is being offered as evidence that Opposer's mark is not a strong one, one of the factors considered in establishing the validity of Opposer's claim" of likelihood of

shows, as noted previously, that the registration is subsisting and owned by opposer. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). Moreover, in both the testimony of its president and in its brief, applicant admits, as is readily apparent in any event, that the marks "SAFE'N SOUND" and "SAFE & SOUND" are similar in sound and appearance. The only real issue to be determined, therefore, is whether applicant's "SAFE & SOUND" mark, when used in connection with the goods set forth in its application, including in particular "anti-scald devices for showers" and "indoor door restraints," so resembles opposer's "SAFE'N SOUND" mark for "non-metal solid doors" that confusion is likely as to the source or sponsorship of the parties' goods.

According to the record, opposer "is a Canadian corporation engaged in the design, manufacture, marketing and sale of interior and exterior doors, door frames, and door components, including its line of interior doors sold under the mark SAFE'N SOUND." (Murray dec. at ¶3.) Opposer "has been selling door-related products for more than forty years and is one of the largest door manufacturers in the world." (Id.) In particular, since November 1992, it "has continuously used its SAFE'N SOUND mark in connection with the marketing and sale of non-metal solid doors," although when such mark was first used in commerce with the United States has not been clearly indicated. (Id. at ¶4.) While, since 1994, opposer "has distributed and

confusion. Accordingly, opposer's objection is sustained and the statements regarding settlement discussions have not been considered.

sold over \$60 million dollars' worth of SAFE'N SOUND products under the SAFE'N SOUND mark, with annual sales as follows," the percentage thereof attributable to sales in the United States of its non-metal solid doors has not been provided:

<u>Year</u>	<u>Amount</u>
1994	\$5,000,000
1995	\$7,500,000
1996	\$8,750,000
1997	\$12,700,000
1998	\$15,150,000
1999 (January to June)	\$10,400,000

(Id.)

Opposer "has extensively advertised its SAFE'N SOUND line of doors nationwide in a variety of media, including television and printed advertisements, product literature and other promotional material, some of which is made available over the Internet." (Id. at ¶5.) In this regard, opposer "has expended substantial amounts of money, time, and effort in advertising, promoting and popularizing the SAFE'N SOUND mark throughout the United States." (Id.) Specifically, since 1993, opposer "has spent over \$2.8 million promoting its safety door products under the SAFE'N SOUND mark, averaging over \$400,000 a year on advertising, as follows:"

<u>Year</u>	<u>Amount</u>
1994	\$250,000
1995	\$750,000
1996	\$750,000
1997	\$150,000
1998	\$250,000
1999 (January to June)	\$500,000

(Id.) Representative samples of ads and promotional materials used by opposer during the above years include various product

brochures and advertisements in such publications as Southern Living, Home Builder, Home and Builder.

Opposer "sells its SAFE'N SOUND doors to residential homebuilders, residential home improvement contractors, and homeowners." (Id. at ¶7.) As to the channels of trade for its products, Mr. Murray indicates that:

The SAFE'N SOUND doors are distributed through "one-step" and "two-step" wholesale millwork distributors and warehouse home improvement or box store retailers. "One-step millwork distributors sell directly to homebuilders and residential home improvement contractors. "Two-step" wholesale millwork distributors sell to dealers such as lumberyards, home center retailers, superstores, and building supply dealers, which in turn sell to homebuilders, residential home improvement contractors, and homeowners. Box store retailers sell primarily to homeowners and residential home improvement contractors.

(Id.)

Opposer's "SAFE'N SOUND" doors are designed for noise reduction and increased fire resistance." (Id. at ¶8.) In particular, as to the latter, independent laboratory testing has verified that opposer's "SAFE'N SOUND doors are more fire-resistant, and therefore safer, than the standard interior doors found in the home." (Id.) In its advertising materials, "the increased fire resistance of the "SAFE'N SOUND doors is specifically promoted as a feature of the product." (Id.)

Opposer "has been active in policing its SAFE'N SOUND mark to ensure that there is no customer confusion or dilution and, where necessary, has opposed the registration of [several]

marks [considered to be] confusingly similar" to its mark.⁶ (Id. at ¶9.) Opposer insists that, as a result of its policing, together with "its extensive sales, advertising and promotion of products under the SAFE'N SOUND" mark, such mark "has become famous in the industry and is widely associated with" opposer and its "SAFE'N SOUND brand interior doors." (Id. at ¶10.)

Applicant, the record shows, "sells and installs child safety products, as would be typically used by parents with infant and toddler aged children to 'childproof' their homes" and which "could also be used by persons other than parents, such as nursery schools and day care centers, and any other place where small children are likely to be present for an extended period." (Shandelman dec. at ¶1.) According to applicant's president, "[t]he main purposes of all of Applicant's products is to make common household items safe for small children, or to prevent unauthorized use or access of certain objects by small children, while allowing use and access by adults." (Id.) In addition, "[m]ost of Applicant's products could ... be used for safety applications in connection with mentally or physically impaired

⁶ Specifically, in one opposition, an application to register the mark "SAFE & SOUND" for manufactured housing, namely, mobile homes, was abandoned without opposer's written consent thereto. In another opposition, involving an application to register the mark "SAFE & SOUND" for audio transmitters and receivers for use in monitoring sounds made by infants, electrical and dimmer switches, and audio cassette players in International Class 9 and table lamps, hanging lamps for cribs, voice activated lamps, and sound emitting lamps in International Class 11, the proceeding was settled by amendment of the application, with opposer's consent thereto, to eliminate electrical and dimmer switches from the list of goods for which registration of the mark was sought. A third opposition brought by opposer, involving the mark "SAFE & SOUND" for laminated insulating glass units for windows "is currently pending before the ... Board." (Murray dec. at ¶9(c).)

persons, instead of children." (Id. at ¶4.) However, while applicant "is and will be marketing its products for such additional applications, ... the sole customer application up to this time has been child safety." (Id.)

"Applicant has used the mark SAFE & SOUND in connection with ... the sale of goods since March 1994. The mark symbolizes the goal of the company's products: to keep customers' children safe from potential hazards commonly found in the home." (Id. at ¶5.) "Because Applicant is geared specifically towards child safety, it sells its products through specialized outlets that are also geared to the market segment of parents with young children," such as "a child furniture store." (Id. at ¶7.)

Applicant stresses that it does not sell, in general, safety products, home products or building products, including doors of any kind. Indeed, according to Mr. Shandelman:

We ... do not consider ourselves to be in the business of selling door related products. A very few of the child safety products that we sell are designed for use with a door. For example, we sell a ... top door latch. Our top door latch is a simple device that fits over the top of an interior door that permits an adult to lock and unlock an interior door from either side of the door, without having to use the door knob lock or a key. Because the latch is located on the top of the door, it cannot be reached by a child, as can a door knob. Although this type of latch is physically attached to a door, we do not consider it to be a type of typical door hardware, or a type of door hardware that would be typically sold in connection with doors generally. This type of latch is specifically designed for use with children, as it does not "lock" the door in the typical sense against intruders,

etc. It only prevents the door from being opened, from either side, by children who can reach and turn a door knob, but who are too short to reach the latch on the top of the door. Therefore, we do not believe that ... our ... top door latch[es] are ... "door related products," but [instead] ... are child safety products that happen to be used in connection with a door.

(Id. at ¶9.) Thus, because applicant regards its goods as child safety products, such goods are not sold in the same channels of trade as are opposer's doors.

Applicant "advertises the sale of its products through child oriented media, such as Parenting magazine." (Id. at ¶11.) It has never advertised its products in any of the specific trade or general interest magazines utilized by opposer to advertise its doors. As noted previously, applicant sells its goods in children's furniture stores, such as two Bellini outlets located in New Jersey, and does not sell its products, "and never has," through any of the wholesale millwork distributors, warehouse home improvement retailers or box store retailers utilized by opposer to sell its doors. (Id. at ¶13.) Furthermore, according to Mr. Shandelman:

Even if Applicant were to begin selling its products through box store retailers (which Applicant understands to be stores such as Home Depot and Lowes), Applicant believes that its variety of child safety products would not be sold in the same area of such a store as would doors. The undersigned believes this based on his personal knowledge of many Home Depot stores throughout the United States, where he has observed Opposer's door products for sale in a section solely relegated to doors, and child safety products such as cabinet locks ... and anti-scald devices sold in a completely different section of the store. Based upon his

personal observations, the undersigned believes that none of Applicant's products, including the top door latch ..., would be sold in near proximity to Opposer's doors, but would be sold in a different area of the store.

With respect to applicant's cabinet and drawer restraints, and in particular its cabinet door locks, applicant points out that such goods "are designed for use on kitchen and bathroom cabinet doors, not on standard structural doors as are sold by Opposer." (Id. at ¶14.) Therefore, according to applicant, the respective goods "are not related, [as they] are not sold in the same channels of commerce." (Id.)

Finally, as to opposer's assertion that its "SAFE'N SOUND" mark is famous, Mr. Shandelman notes that he "has personally observed, in the Home Depot store in King of Prussia, Pennsylvania and in several other locations throughout the country, the sale of Opposer's doors" and that while such goods "were strongly identified and sold as the 'Premdor' brand, ... the 'SAFE'N SOUND' mark was relatively hidden and not at all prominent." (Id. at ¶15.) Moreover, according to his testimony, he "has a number of customers and business acquaintances engaged in the home building and remodeling businesses, principally in eastern Pennsylvania and New Jersey," and that "[b]ased upon an informal survey of these people, none of them were familiar with the Opposer's mark 'SAFE'N SOUND' for doors, although approximately half of them were familiar with the brand 'Premdor.'" (Id. at ¶16.)

The only relevant evidence offered by opposer in rebuttal consists of a point-of-purchase display utilized in a HomeBase "warehouse-style home improvement store," located in Renton, Washington, which "sells Premdor SAFE'N SOUND doors but did not carry them in stock."⁷ (Merritt dec. at ¶3.) Such display, as attested to by Mr. Merritt, does in fact feature, "in part, ... an 'Interior Door Selection Guide' prominently displaying the mark 'SAFE'N SOUND.'" (Id.)

Turning to the issue of likelihood of confusion, we find upon consideration of the pertinent factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), that on this record confusion as to source or affiliation is likely to occur with respect to contemporaneous use of the respective marks in connection with applicant's indoor door restraints and opposer's non-metal solid doors, but it is not likely to take place from contemporaneous use of such marks in connection with applicant's anti-scald devices for showers, cabinet and drawer restraints, and interior gates and opposer's

⁷ While opposer also submitted evidence, by the declaration of Jennifer Nahorniak, of its use of its "SAFE'N SOUND" mark in connection with the retail sale of its doors at a Home Depot home improvement store located in Toronto, Ontario, Canada, it is well settled that such foreign use is ineffective to establish trademark rights in the United States and is thus irrelevant to a determination of likelihood of confusion here. See, e.g., *Hard Rock Cafe Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1405 (TTAB 1998) ["renown of opposer's marks outside the United States or exposure of the foreign public to opposer's marks is irrelevant"]; *Fruit of the Loom Inc. v. Fruit of the Earth Inc.*, 3 USPQ2d 1531, 1534 (TTAB 1987) ["[t]rademark activity outside the United States is ineffective to create rights in this country"]; and *Lever Brothers Co. v. Shaklee Corp.*, 214 USPQ 654, 657 (TTAB 1982) at n. 8 [because "any trademark activity outside the United States is ineffective to create rights within this country," "evidence of such use is irrelevant to any of the issues in the proceeding before us"].

non-metal solid doors. As a starting point, it is plain that applicant's "SAFE & SOUND" mark is substantially similar, if not virtually identical, to opposer's mark "SAFE'N SOUND" in sound, appearance, connotation and overall commercial impression. Both marks begin and end, respectively, with the words "SAFE" and "SOUND," and the terms separating such words, namely, the apostrophe/letter "N" combination ("'N") in applicant's mark and the ampersand ("&") in registrant's mark, signify the conjunction "AND." Overall, both marks identically suggest the safety related features or uses of the parties' respective products.

Thus, if the marks at issue were to be used in connection with closely related goods, confusion as to the origin or sponsorship thereof would be likely. It is also the case, however, that due to the highly suggestive nature of the respective marks, the scope of protection to which they are entitled, in the absence, for example, of proof of fame of opposer's mark, is correspondingly less than would generally be the case for arbitrary or fanciful marks.

Turning, with the above in mind, to consideration of the respective goods, applicant principally argues that the parties' goods are not related because its goods are child safety products, which are typically sold in children's furniture stores, while opposer's goods, even though they feature some safety attributes such as increased fire resistance, are basically building or remodeling materials, which are generally sold in completely different channels of trade such as millwork distributors and home improvement retailers. Applicant contends,

therefore, that "at the present time, there is no possible overlap in the marketing of Opposer's and Applicant's products that could lead to confusion."⁸

In addition, as to opposer's assertion that the parties' goods could be sold in the same retail channels of trade, applicant "concedes that this is possible, although not terribly likely." Applicant specifically insists, however, that:

Even assuming that Applicant's products could be sold in a large home improvement retail store that also carries Opposer's doors, Applicant does not believe that any confusion would occur. Such stores typically arrange products in logical categories, such as doors in one area, door hardware (hinges, knobs, locks) in another area, and child products in another. (Shandelman Decl. at ¶13.) Accordingly, the evidence before the Board in this proceeding shows no likelihood of confusion between the goods of Opposer and Applicant.

Where, as here, the goods of the parties on their face are specifically different, it is incumbent upon opposer, as the party having the burden of proof, to show that the respective goods are related in some viable fashion and/or that they are marketed or promoted under circumstances and conditions that could bring them to the attention of the same purchasers or prospective customers in a situation that could cause such consumers reasonably to assume, because of the virtual identity

⁸ While, as to another *du Pont* factor, applicant urges that "neither Opposer nor Applicant has testified that they are aware of any instance of actual confusion between their goods by any consumer," suffice it to say that absence of such evidence is not evidence of absence of actual confusion. The length of time and conditions under which there has been contemporaneous use of the parties' marks without evidence of actual confusion is accordingly not a relevant *du Pont* factor in this proceeding.

of the parties' marks, that the respective goods share a common source or sponsorship. See, e.g., Amcor, Inc. v. Amcor Industries, Inc., 210 USPQ 70, 78 (TTAB 1981). Nevertheless, as opposer correctly points out, it is settled in this regard that the registrability of an applicant's mark must be evaluated on the basis of the identifications of goods and/or services set forth in the involved application and any pleaded registrations of record, regardless of what the record may reveal as to the particular nature of the respective goods and/or services, their actual channels of trade, or the class of purchasers to which they are in fact directed and sold. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) and Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987).

Furthermore, it is well established that, absent any specific limitations or restrictions in the identifications of goods and/or services as listed in an applicant's application and an opposer's registration(s), the issue of likelihood of confusion must be determined in light of consideration of all normal and usual channels of trade and methods of distribution for the respective goods. See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Here, neither applicant's "anti-scald devices for showers" nor its "non-metallic devices

and apparatus designed to prevent injury to children and mentally or physically impaired persons, namely, cabinet and drawer restraints, interior gates and indoor door restraints" are specifically limited, either expressly or implicitly, as being for sale in children's furniture stores or any other retail outlets which cater primarily to the safety or other needs of children. Applicant's goods, therefore, must be considered to be suitable for sale in, for example, at least some of the same channels of trade, such as warehouse home improvement centers and box store retailers, as are opposer's non-metal solid doors. Moreover, and in any event, the testimony of applicant's president confirms that, based on his personal knowledge of many Home Depot stores throughout the United States, such stores offer doors for sale as well as child safety products like cabinet locks and anti-scald devices.

However, with the sole exception of applicant's "indoor door restraints," such as its top door latches, which by their very nature are specifically designed, as applicant admits, for use in connection with interior doors, none of applicant's goods, even though suitable for sale in outlets like warehouse home improvement centers and box store retailers, have been shown, either on account of their nature or in fact, as being offered for sale in the same departments as, or otherwise in close proximity to, opposer's "non-metal solid doors." Notwithstanding the absence of such proof, and ignoring altogether applicant's "anti-scald devices for showers," which plainly by their very nature have nothing to do with doors, opposer argues that its

goods and those of applicant are in fact closely related in a commercial sense because the "goods at issue overlap in that they both pertain to doors and they both pertain to safety."

The fact that opposer, however, sells and promotes its doors as being safer than, for instance, ordinary hollow-core interior doors does not, without more, establish that its doors would be seen as commercially or otherwise closely related to applicant's "anti-scald devices for showers," "interior gates" and/or "cabinet and drawer restraints," simply because such goods, like applicant's "indoor door restraints," are principally sold and used as safety devices and apparatus. Stated otherwise, the mere fact that the parties' goods are designed to meet safety concerns in the home or institutions where they would be used does not itself establish a viable relationship between the respective goods. In particular, while goods such as opposer's "non-metal solid doors" and applicant's "cabinet and drawer restraints," "interior gates" and, especially, "indoor door restraints," could broadly be considered, as opposer contends in its main brief, "door safety products" which would be sold through the same channels of trade to the same classes of purchasers, it is settled that simply because a term may be found which encompasses the parties' products does not mean that customers will view the goods as related in the sense that they will assume that they emanate from or are associated with a common source. See, e.g., General Electric Co. v. Graham Magnetics Inc., 197 USPQ 690, 694 (TTAB 1977) and Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd., 188 USPQ 517, 520 (TTAB 1975).

However, as to applicant's "indoor door restraints," including its top door latches, and opposer's "non-metal solid doors," we find that such goods, in light of their intrinsic nature, would be considered closely related products by consumers. To state the obvious, even if not sold in near proximity to indoor doors, applicant's indoor door restraints are specifically designed for use in connection with such doors, including those manufactured and sold by opposer. Purchasers and prospective customers for the parties' goods who are familiar with the mark "SAFE'N SOUND" for opposer's non-metal solid doors could reasonably assume, upon encountering the virtually identical mark "SAFE & SOUND" for applicant's interior door restraints, that the latter goods are specially made or sponsored by opposer for use in connection with its products.⁹

Finally, we note the conclusory opinion of one of opposer's witnesses that its "SAFE'N SOUND" mark is "has become famous in the industry and is widely associated with" opposer and its interior doors. (Murray dec. at ¶10.) As our principal reviewing court in *Kenner Parker Toys Inc. v. Rose Art Industries*

⁹ In this regard, there is simply nothing in the record to show that buyers of the respective goods would not generally include ordinary, reasonably prudent consumers. Moreover, even if customers for the parties' goods could be viewed as knowledgeable and discriminating consumers when it comes to selecting interior doors and indoor door restraints, such sophistication and care on the part of buyers "does not necessarily preclude their mistaking one trademark for another" or establish that they otherwise are entirely immune from confusion as to source or sponsorship. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also *In re Decombe*, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983).

Inc., 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992), cert. denied, 113 S.Ct. 181 (1992), has pointed out:

The fifth *duPont* factor, fame of the prior mark, plays a dominant role in cases featuring a famous or strong mark. Famous or strong marks enjoy a wide latitude of legal protection.

That the "fame of the prior mark, when present, plays a 'dominant' role in the process of balancing the *du Pont* factors" was recently reaffirmed by such court in *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000).

In the present case, however, we find that opposer has failed to establish that its "SAFE'N SOUND" mark is indeed famous for its non-metal solid doors. While opposer has shown, through Mr. Murray's testimony, that it has been selling door-related products for more than 40 years and that it is one of the largest door manufacturers in the world, continuous use of its "SAFE'N SOUND" mark did not commence until November 1992 in connection with the marketing and sale of non-metal solid doors. More significantly, as pointed out earlier, opposer has failed to indicate clearly the extent of such use of its mark in commerce with the United States. Although it seems fair to assume, in light of opposer's having expended, since 1993, an average of over \$400,000 a year on advertising and promoting its "SAFE'N SOUND" mark throughout the United States, for a total expenditure of over \$2.8 million, that opposer must have had at least some sales in the United States in order to justify such expenditures, the record simply does not provide any indication as to the size of the marketplace as a whole for interior doors. We therefore

have no way of knowing whether, as a result of opposer's sales and advertising in the United States, as well as its policing activities in this country, the "SAFE'N SOUND" mark is regarded here as a famous mark by consumers, so that they would be likely to reasonably believe, upon encountering use of the mark "SAFE & SOUND" in connection with anti-scald devices for showers, cabinet and drawer restraints, and interior gates, that such diverse safety products for children and infirm individuals emanate from or are affiliated with the same source as opposer's non-metal solid doors.

Decision: The opposition is sustained as to the "indoor door restraints" in International Class 20 of the involved application, but is otherwise dismissed.